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No. 05-1587

Supreme Court U.S.
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In The
# Supreme Court of the United States

STATE OF ARKANSAS,

*Petitioner,*

v.

BRADY CARTER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Arkansas Supreme Court**

## REPLY BRIEF

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The respondent mistakenly relies on the trial judge's alternative purported acquittal finding to ask the Court to avoid the question presented by the Petition. That purported finding, however, was never a basis on which to conclude there had been a factual acquittal of the respondent on the elements of aggravated robbery, and it is certainly not a basis after the Arkansas Supreme Court declined his invitation to rely on it in that court. It certainly is no basis to reject the question presented by the most recent judgment of the Arkansas Supreme Court, which the Petition seeks to correct.

First, the notion that a trial court can find directly contrary facts as alternatives and avoid review of one of those findings is patently absurd. The respondent's quotation of the trial court's finding illustrates as much. The purported acquittal on which the respondent relies is prefaced by the phrase, "if I don't have authority to do that, then . . . ". Resp. Br. at 10. Thus, the trial judge – after finding the statutory, factual elements of aggravated robbery were met, but erroneously concluding that an additional element (the use of a firearm as firearm) was not – "alternatively" concluded that the statutory elements were not met. But factual findings cannot be found in the alternative. Either the statutory elements were met, as the judge found before making his erroneous ruling about the use of a firearm, or they were not. He could not find contrary facts in the alternative.

Second, the Arkansas Supreme Court did not dispose of this case on the trial judge's alternative purported acquittal. It did not do so in the first case decided in 2005, Pet. at App. 1-7, despite the respondent's reliance on that alternative in that court as a cross-appellee. Finally, the court did not do so in the case the Petition now seeks to

have corrected. In fact, the opinion below expressly states that "the trial judge made factual findings that unquestionably supported the statutory definition of aggravated robbery." Pet. App. at 11. Despite that statement about the findings before it, the court below concluded the respondent was acquitted. It is that settled appellate resolution of this case on which the question is presented – to wit: Does a trial court's erroneous rejection of a charged offense without resolving against the government any of the factual elements of the offense constitute an acquittal under the Double Jeopardy Clause? The Court should grant the writ and summarily reverse the Arkansas Supreme Court's affirmative answer to the question.

Respectfully submitted,

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